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# SUPREME COURT OF THE UNITED STATES

JOSEPH P. MAZUREK, ATTORNEY GENERAL OF MONTANA *v.* JAMES H. ARMSTRONG ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 96–1104. Decided June 16, 1997

PER CURIAM.

In 1995, the Montana Legislature enacted a statute restricting the performance of abortions to licensed physicians. 1995 Mont. Laws, ch. 321, §2 (codified at Mont. Code Ann. §50–20–109 (1995)). Similar rules exist in 40 other States in the Nation.[1] The Montana

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[1] See Ala. Admin. Code Rules 420–5–1–.01(2)(k), 420–5–1–.03(2)(a) (Supp. 1990) (limiting performance of abortions to "physicians duly licensed in the State of Alabama," which in turn requires meeting the criteria in Ala. Code §34–24–70 (Supp. 1996)); Alaska Stat. Ann. §§08.64.200, 18.16.010(a)(1) (1996); Ark. Code Ann. §5–61–101(a) (1993); *id.*, §17–95–403 (1995); Cal. Health & Safety Code Ann. §123405 (West 1996) (as interpreted under prior statutory designation in 74 Op. Cal. Atty. Gen. 101 (1991)); Colo. Rev. Stat. §12–36–107 (Supp. 1996); *id.*, §§18–6–101(1), 18–6–102 (1986); Conn. Agencies Regs. §19–13–D54(a) (1997) (limiting performance of abortions to "person[s] licensed to practice medicine and surgery in the State of Connecticut," which in turn requires meeting the criteria in Conn. Gen. Stat. §20–10 (Supp. 1997)); Del. Code. Ann., Tit. 24, §§1720, 1790(a) (Supp. 1996); Fla. Stat. Ann. §§390.001(1)(a), 390.001(3) (1993); *id.*, §§458.311, 459.0055 (1991 and Supp. 1997); Ga. Code Ann. §16–12–141(a) (1996); *id.*, §43–34–27 (1994); Haw. Rev. Stat. §§453–4, 453–16(a)(1) (1993); Idaho Code §18–608 (1997); *id.*, §§54–1803(3), 54–1803(4) (1994); Ill. Comp. Stat., ch. 225, §60/11 (1993); *id.*, ch. 720, §§510/2(2), 510/3.1 (1993); Ind. Code. §§16–18–2–202, 16–18–2–282, 16–34–2–1(1)(A) (1993); *id.*, §25–22.5–3–1 (1995); Iowa Code §§148.3, 707.7 (Supp. 1997); Ky. Rev. Stat. Ann. §§311.571, 311.750 (Michie 1995); La. Rev. Stat. Ann. §37:1272 (West Supp. 1997); *id.*, §§40:1299.35.1, 40.1299.35.2(A)

law was challenged almost immediately by respondents, who are a group of licensed physicians and one physician-assistant practicing in Montana. The District Court denied respondents' motion for a preliminary injunction,

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(West 1992); Me. Rev. Stat. Ann., Tit. 22, §1598(3)(A) (1992); *id.*, Tit. 32, §§2571, 3271 (Supp. 1996); Md. Health Code Ann. §20–208 (1996); Md. Health Occ. Code Ann. §14–307 (Supp. 1995); Mass. Gen. Laws, ch. 112, §§2, 12K, 12L, 12M (1996); Minn. Stat. §§145.412, subd. 1(1), 147.02 (1989) (limiting performance of abortions to licensed physicians and "physician[s] in training under the supervision of . . . licensed physician[s]"); Miss. Code Ann. §73–25–3 (1995); *id.*, §97–3–3(1) (1994) (as interpreted in *Spears* v. *State*, 278 So. 2d 443 (Miss. 1973)); Mo. Rev. Stat. §§188.015(5), 188.020 (1996); *id.*, §334.031 (1989); Neb. Rev. Stat. §28–335 (1995); *id.*, §71–1,104 (Supp. 1996); Nev. Rev. Stat. §442.250(1)(a) (1991); *id.*, §630.160 (1995); N. J. Admin. Code §13:35–4.2(b) (1997) (limiting performance of abortions to "physician[s] licensed to practice medicine and surgery in the State of New Jersey," which in turn requires meeting the criteria in N. J. Stat. Ann. §§45:9–6, 45:9–7 (West 1991), and N. J. Stat. Ann. §45:9–8 (West Supp. 1997)); N. M. Stat. Ann. §§30–5–1(C), 30–5–3 (1994) (as interpreted in N. M. Op. Atty. Gen. 90–19 (1990)); N. M. Stat. Ann. §61–6–11 (1996); N. C. Gen. Stat. §14–45.1(a) (1993); *id.*, §90–9 (Supp. 1996); N. D. Cent. Code §14–02.1–04(1) (1991); *id.*, §43–17–18 (1993); Ohio Rev. Code Ann. §2919.11 (1996); *id.*, §§4731.091, 4731.41 (1994); Okla. Stat., Tit. 59, §493.1 (Supp. 1997); *id.*, Tit. 63, §1–731(A) (1997); 18 Pa. Cons. Stat. §§3203, 3204(a) (1983 and Supp. 1997); 63 Pa. Cons. Stat. §§271.6, 422.28 (1996); R. I. Code R. 14.000.009, 600.1 (1996) (limiting performance of abortions to "physicians licensed under the [applicable provisions of Rhode Island law]," which in turn requires meeting the criteria in R. I. Gen. Laws §5–37–2 (1995)); S. C. Code Ann. §40–47–90 (Supp. 1996) (as implemented by S. C. Code Ann. Regs. §§81–80, 81–81, 81–90 (Supp. 1996)); S. C. Code. Ann. §§44–41–10(b), 44–41–20 (1985); S. D. Codified Laws §34–23A–1(4) (Supp. 1997); *id.*, §§34–23A–3, 34–23A–4, 34–23A–5 (1994); *id.*, §36–4–11 (Supp. 1997); Tex. Health & Safety Code Ann. §245.010(b) (1992); Tex. Rev. Civ. Stat. Ann., Art. 4495b, §3.04 (Vernon Supp. 1997); Utah Code Ann. §§58–67–302, 58–68–302 (Supp. 1996); *id.*, §76–7–302(1) (1995); Va. Code Ann. §§18.2–71, 18.2–72, 18.2–73, 18.2–74 (1996); *id.*, §54.1–2930 (1994); Wash. Rev. Code §§9.02.110, 9.02.120, 9.02.170(4) (Supp. 1997); *id.*, §§18.57.020, 18.71.050 (Supp. 1997); Wis. Stat. §§448.01(5) (1988 and Supp. 1996); *id.*, §940.15(5) (1996); Wyo. Stat. §33–26–303 (Supp. 1996); *id.*, §35–6–111 (1994).

finding that they had not established any likelihood of prevailing on their claim that the law imposed an "undue burden" within the meaning of *Planned Parenthood of Southeastern Pa.* v. *Casey,* 505 U. S. 833 (1992). 906 F. Supp. 561, 567 (Mont. 1995). The Court of Appeals for the Ninth Circuit vacated the District Court's judgment, holding that respondents had shown a "fair chance of success on the merits" of their claim, and thus had met the threshold requirement for preliminary injunctive relief under Circuit precedent. 94 F. 3d 566, 567–568 (1996). The case was remanded to the District Court with instructions to reconsider the "balance of hardships" and determine whether entry of a preliminary injunction was ultimately warranted. *Ibid.* The District Court has not yet reconsidered the merits of the preliminary-injunction motion, but it has entered (based on the parties' stipulations) an injunction pending appeal pursuant to Federal Rule of Civil Procedure 62(c), and has postponed its hearing on the preliminary-injunction motion until our disposition of petitioner's certiorari petition. Order Granting Injunction Pending Appeal, No. CV 95–083–GF–PGH (Mont., Nov. 5, 1996), App. to Pet. for Cert. 31a–32a. As a consequence, Montana's physician-only requirement is unenforceable at the present time against respondent Susan Cahill, who is the only nonphysician licensed to perform abortions in Montana.

The Court of Appeals' conclusion that respondents had established a "fair chance of success on the merits" of their constitutional challenge is inconsistent with our treatment of the physician-only requirement at issue in *Casey*. That requirement involved only the provision of *information* to patients, and not the actual *performance* of abortions, yet we nonetheless held—overruling our prior holding in *Akron* v. *Akron Center for Reproductive Health, Inc.,* 462 U. S. 416, 448 (1983)—that the limitation to physicians was valid. *Casey, supra,* at 884–885. We found that "[s]ince there is no evidence on this record that requiring a doctor to give the informa-

tion as provided by the statute would amount in practical terms to a *substantial obstacle to a woman seeking an abortion*, . . . it is not an undue burden." 505 U. S., at 884–885 (emphasis added). The District Court, quoting this precise passage, held: "There exists insufficient evidence in the record to support the conclusion [that] the requirement that a licensed physician perform an abortion would amount, 'in practical terms, to a *substantial obstacle to a woman seeking an abortion*.' Accordingly, it is unlikely that [respondents] will prevail upon their suggestion that the requirement constitutes an 'undue burden' within the meaning of *Casey*." 906 F. Supp., at 567 (quoting *Casey, supra,* at 884 (emphasis added)).

The Court of Appeals never contested this District Court conclusion that there was "insufficient evidence in the record" that the requirement posed a "substantial obstacle to a woman seeking an abortion." Instead, it held that the physician-only requirement was arguably invalid because its *purpose*, according to the Court of Appeals, may have been to create a substantial obstacle to women seeking abortions. 94 F. 3d, at 567. But even assuming the correctness of the Court of Appeals' implicit premise—that a legislative *purpose* to interfere with the constitutionally protected right to abortion without the *effect* of interfering with that right (here it is uncontested that there was insufficient evidence of a "substantial obstacle" to abortion) could render the Montana law invalid—there is no basis for finding a vitiating legislative purpose here. We do not assume unconstitutional legislative intent even when statutes produce harmful results, see, *e.g.*, *Washington* v. *Davis*, 426 U. S. 229, 246 (1976); much less do we assume it when the results are harmless. One searches the Court of Appeals' opinion in vain for any mention of any evidence suggesting an unlawful motive on the part of the Montana Legislature. If the motion at issue here were a defendant's motion for summary judgment, and if the plaintiff's only basis for proceeding with the suit

were a claim of improper legislative purpose, one would demand *some* evidence of that improper purpose in order to avoid a nonsuit. And what is at issue here is not even a defendant's motion for summary judgment, but a plaintiff's motion for preliminary injunctive relief, as to which the requirement for substantial proof is much higher. "It frequently is observed that a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure §2948, pp. 129–130 (2d ed. 1995) (emphasis added; footnotes omitted).

Respondents claim in this Court that the Montana law must have had an invalid purpose because "all health evidence contradicts the claim that there is any health basis" for the law. Brief in Opposition 7. Respondents contend that "the only extant study comparing the complication rates for first-trimester abortions performed by [physician-assistants] with those for first-trimester abortions performed by physicians found no significant difference." *Ibid.* But this line of argument is squarely foreclosed by *Casey* itself. In the course of upholding the physician-only requirement at issue in that case, we emphasized that "[o]ur cases reflect the fact that the Constitution gives the States broad latitude to decide that particular functions may be performed only by licensed professionals, *even if an objective assessment might suggest that those same tasks could be performed by others.*" 505 U. S., at 885 (emphasis added). Respondents fall back on the fact that an anti-abortion group drafted the Montana law. But that says nothing significant about the legislature's purpose in passing it.

Today's dissent, for its part, claims that "there is substantial evidence indicating that the sole purpose of the statute was to target a particular licensed professional" (respondent Susan Cahill). *Post,* at 4. It is true that the law "targeted" Cahill in the sense that she was

the only nonphysician performing abortions at the time it was passed. But it is difficult to see how that helps rather than harms respondents' case. The dissent does not claim that this was an unconstitutional bill of attainder, nor was that the basis on which the Court of Appeals relied. (Such a contention would be implausible as applied to a provision so commonplace as to exist in 40 other States, see n. 1, *supra*.) And the basis on which the Court of Appeals *did* rely (that the purpose of the law may have been to create a "substantial obstacle" to abortion) is positively contradicted by the fact that only a single practitioner is affected. That is especially so since under the old scheme Cahill could only perform abortions with a licensed physician (who also performs abortions) present, see Brief in Opposition 4, meaning that no woman seeking an abortion would be required by the new law to travel to a different facility than was previously available. All this strongly supports the District Court's finding, after hearing testimony, that there was insufficient evidence that the law created a "substantial obstacle" to abortion. And there is simply no evidence that the legislature intended the law to do what it plainly did not do.[2]

The Court of Appeals' decision is also contradicted by our repeated statements in past cases—none of which was so much as cited by the Court of Appeals, despite the District Court's discussion of two of them—that the performance of abortions may be restricted to physicians. We first expressed this view (although it was not necessary to our holding) in *Roe* v. *Wade*, 410 U. S. 113, 165 (1973), saying that "[t]he State may define the term 'physician,' . . . to mean only a physician currently

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[2] Since the record does not support a conclusion that "the legislature's predominant motive, see *Shaw* [v. *Hunt*, 517 U. S. ___ (1996)]," *post*, at 4, was to create a "substantial obstacle" to abortion, it is quite unnecessary to address "whether the Court of Appeals misread this Court's opinions in *Miller* [v. *Johnson*, 515 U. S. ___ (1995)] and *Shaw*," *post*, at 5–6.

licensed by the State, and may proscribe any abortion by a person who is not a physician as so defined." We reiterated this view in *Connecticut* v. *Menillo*, 423 U. S. 9, 11 (1975), where, in the course of holding that the Federal Constitution posed no bar to the conviction of a person with no medical training for the performance of an abortion, we said that "prosecutions for abortions conducted by nonphysicians infringe upon no realm of personal privacy secured by the Constitution against state interference." Finally, in *Akron*, *supra*, in the course of striking down a requirement that licensed physicians rather than other medical personnel provide specified information to patients (the holding overruled in *Casey*), we emphasized that our prior cases "left no doubt that, to ensure the safety of the abortion procedure, the States may mandate that only physicians perform abortions." 462 U. S., at 447 (citing *Roe*, *supra*, at 165, and *Menillo*, *supra*, at 11).

Respondents urge us to ignore the error in the Court of Appeals' judgment because the case comes to us prior to the entry of a final judgment in the lower courts. It is true that we are ordinarily reluctant to exercise our certiorari jurisdiction in that circumstance. See, *e.g.*, *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U. S. 251, 258 (1916). But our cases make clear that there is no absolute bar to review of nonfinal judgments of the lower federal courts, see, *e.g.*, *Estelle* v. *Gamble*, 429 U. S. 97, 98 (1976); *United States* v. *General Motors Corp.*, 323 U. S. 373, 377 (1945); see also R. Stern, E. Gressman, S. Shapiro, & K. Geller, Supreme Court Practice §4.18 (7th ed. 1993) (citing cases), and we conclude here that reversal of the Court of Appeals' judgment in a summary disposition is appropriate, for two reasons. First, as already noted, the Court of Appeals' decision is clearly erroneous under our precedents.[3] Second, the lower court's judgment has pro-

[3] The dissent says that the Court of Appeals did not resolve any

duced immediate consequences for Montana—in the form of a Rule 62(c) injunction against implementation of its law pending the District Court's resolution of respondents' motion for a preliminary injunction—and has created a real threat of such consequences for the six other States in the Ninth Circuit that have physician-only requirements.[4] Indeed, plaintiffs in the Ninth Circuit seeking to challenge those States' laws may well be able to meet the threshold "fair chance of success" requirement for a preliminary injunction merely by alleging an improper purpose for the physician-only rule, since, as noted above, the Court of Appeals did not appear to rely on any evidence suggesting an unlawful motive on the part of the Montana Legislature.[5]

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important issue of law in this case, but instead merely remanded to the District Court after "determin[ing] that a further inquiry into the facts [was] appropriate." *Post*, at 4, 5. We disagree. The Court of Appeals expressly found, and it was necessary to its disposition, that respondents had shown a "fair chance of success" on their claim of undue burden. 94 F.3d 566, 567–568 (CA9 1996). As already explained, that determination of law is inconsistent with our precedents.

[4] See Alaska Stat. Ann. §§08.64.200, 18.16.010(a)(1) (1996); Cal. Health & Safety Code Ann. §123405 (West 1996) (as interpreted under prior statutory designation in 74 Op. Cal. Atty. Gen. 101 (1991)); Haw. Rev. Stat. §§453–4, 453–16(a)(1) (1993); Idaho Code §18–608 (1997); *id.*, §§54–1803(3), 54–1803(4) (1994); Nev. Rev. Stat. §442.250(1)(a) (1991); *id.*, §630.160 (1995); Wash. Rev. Code §§9.02.110, 9.02.120, 9.02.170(4) (Supp. 1997); *id.*, §§18.57.020, 18.71.050 (Supp. 1997).

[5] The dissent contends that some States which restrict the performance of abortions to licensed physicians may define "licensed physician" to include "physician-assistant" when the latter works under the former's supervision; thus, the dissent says, the Court of Appeals' decision may not in fact be inconsistent with the physician-only regimes of other States. *Post*, at 5. But the provisions of state law to which the dissent points reflect the general definition of what qualifies as the "authorized practice" of medicine, without making any specific reference to abortion. See, *e.g.*, Fla. Stat. Ann. §§458.303(1)(a), 458.327(1), 458.347 (1991 and Supp. 1997); *post*, at 5, n. 7 (citing statutes). Thus, for example, under Florida law, the

For the foregoing reasons, we grant the petition for certiorari, reverse the judgment of the Court of Appeals, and remand for further proceedings consistent with this opinion.

*It is so ordered.*

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performance of an abortion by a physician-assistant would not constitute "practic[ing] medicine . . . without a license" for purposes of the felony defined in Fla. Stat. Ann. §458.327(1), but there is no reason to think it would not violate the more specific prohibition on the performance of abortions by persons other than "a doctor of medicine or osteopathic medicine licensed by the state under chapter 458 or chapter 459," Fla. Stat. Ann. §§390.001(1)(a), 390.001(3) (1993). A formal opinion by the Attorney General of California has reached precisely this conclusion under that State's law: "[W]e cannot accept the notion that the Legislature meant to gainsay th[e] carefully tailored and highly specific determination [that abortions should be performed by licensed physicians] when it . . . adopted the general language of the Physician Assistant Practice Act." 74 Op. Cal. Atty. Gen. 101, 108 (1991).